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In the Supreme Court
OF THE
United States

OCTOBER TERM 1970

No.

DANIEL OWEN LLOYD, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Amicus Curiae urges that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case December 8, 1970.

STATEMENT OF AMICUS CURIAE

The American Civil Liberties Union of Northern California is a non-profit and non-partisan organiza-

tion dedicated to preserving the individual liberties guaranteed by the Bill of Rights. In pursuit of this objective, it files this brief with the consent of the parties.[1] We are deeply concerned that a person can be imprisoned when the prosecution's only evidence is a file, used not just to prove incidental or uncontested facts, but as the sole proof of specific criminal intent, a necessary element of the crime. Trial by file is unconstitutional.

The petitioner, Daniel Owen Lloyd ("Lloyd"), was indicted for refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. §462 (1967).[2]

At his trial, Lloyd did not dispute that he had failed to submit to induction after reporting as ordered.[3] He did, however, deny the requisite criminal intent, *i.e.*, that his failure was a knowing and wilful one. (Specific criminal intent is an essential element of the offense. See Appendix A.) The government's only evidence was a copy of Lloyd's Selective Service file, which contained a printed report from the induction center. After routine authentication, the file was introduced into evidence,[4] over Lloyd's timely confrontation and hearsay objection, as a business and official record under a statutory exception to the hearsay rule, 28 U.S.C. §§1732-1733 (1964). The

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[1]Pursuant to Rule 42, letters of consent from counsel for each party are on file with the Clerk.

[2]Unless otherwise noted, facts stated are taken from the Court of Appeals' opinion. (Appendix A to Petitioner's Brief.)

[3]Petitioner's Brief at 8.

[4]Government's Exhibit 1.

government produced no witnesses. Once the file was admitted, the prosecution rested.

Lloyd then testified without dispute that he had been a lifelong Jehovah's Witness (R.T. 174), that he shared the beliefs of that religious organization against killing and participation in war (R.T. 174-5), that he was generally ignorant of the Selective Service law and his rights thereunder, relying upon inaccurate information from his friends (R.T. 176-187), and that he claimed conscientious objector status when he originally registered, but did not send in the follow-up Form 150 because he mistakenly thought it applied only to full-time ministers. (R.T. 176-7).[5]

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[5]The trial court interrupted Lloyd's direct testimony to cross-examine him vigorously, and in so doing left little doubt of its views of Lloyd's knowledge and intent. (R.T. 179-182.) For example:

"The Court: If I understand Jehovah's Witness (sic), they all object to serving in the Armed Service, and that is the continued (sic) problem with all of them. It is their common objective. You are not alone in this. You associate with other Jehovah Witnesses (sic), don't you?

The Witness: Yes.

The Court: I understand that they are quite congenial with one another and get along with one another. You pray with them and go through other religious ceremonies, don't you?

The Witness: Yes.

The Court: Didn't you discuss the draft problem with them——

The Witness: No, I should have.

The Court: *—because normally speaking, Jehovah Witnesses* (sic) *are well advised of their rights. They are probably the best advised group of people we have, and you tell me that you didn't even talk to these people in your own church who know their way around?* There are such people in your church, or your very own church in Santa Cruz. I think that is the church you belong to?

The Witness: Yes." (R.T. 181-2.) (Emphasis added.)

Lloyd also subpoenaed officials of his local board to testify that it had never considered his original claim for an exemption. The government's motion to quash these subpoenas was granted.

After denying Lloyd's motion for acquittal, the court allowed the case to go to the jury, instructing it that the only questions to decide were (1) whether Lloyd "failed to submit for induction into the Armed Forces of the United States, after he had reported as ordered by the Local Board" and (2) whether "the omission or failure to submit was wilfully and knowingly done."

After a verdict of guilty, the court sentenced Lloyd to federal prison for 18 months, without probation. On Lloyd's appeal, the Court of Appeals for the Ninth Circuit affirmed the judgment against him, hence his petition and this brief amicus curiae.

REASONS FOR GRANTING THE WRIT

1. This case affords an opportunity to articulate rules that will preclude indiscriminate use of the business and official records exceptions to the hearsay rule inimical to the right of confrontation and due process in criminal trials. The Court will thereby resolve the growing conflict and confusion in the lower courts.

2. This case affords an opportunity to rule that the government may not offer records as its sole proof of an essential and disputed element of a crime when

witnesses who observed the recorded events are able to testify and be cross-examined.

3. This case affords an opportunity to articulate minimum standards of proof and evidence in a federal criminal case, namely that the federal statutory exceptions to the hearsay rule were not intended to and do not permit the government to convict and imprison a federal defendant without presenting any evidence of his crime but a government file.

ARGUMENT

I. THIS CASE AFFORDS AN OPPORTUNITY TO ARTICULATE RULES THAT WILL PRECLUDE INDISCRIMINATE USE OF THE BUSINESS AND OFFICIAL RECORDS EXCEPTIONS TO THE HEARSAY RULE INIMICAL TO THE RIGHT OF CONFRONTATION AND DUE PROCESS IN CRIMINAL TRIALS. THE COURT WILL THEREBY RESOLVE THE GROWING CONFLICT AND CONFUSION IN THE LOWER COURTS.

The several recent cases in which the Court has considered the right of confrontation[6] have involved testimonial hearsay evidence presented by the prosecution when there was cross-examination either of the original declarant, *e.g., California v. Green,* 399 U.S. 149 (1970) (preliminary hearing testimony of informer), or of the witness through whom a peripheral

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[6] *Sixth Amendment.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

statement was introduced, *e.g., Dutton v. Evans,* 39 U.S.L.W. 4015 (Dec. 15, 1970) (fellow prisoner testifying to a co-conspirator's statement). In these cases, the Court was reluctant to find a violation of the right of confrontation.

When, however, the admitted evidence was critical and there was no chance for effective cross-examination, the Court has found such a violation. *Roberts v. Russell,* 392 U.S. 293 (1968); *Bruton v. United States,* 391 U.S. 123 (1968); *Barber v. Page,* 390 U.S. 719 (1968); *Brookhart v. Janis,* 384 U.S. 1 (1966); *Douglas v. Alabama,* 380 U.S. 415 (1965); *Pointer v. Texas,* 380 U.S. 400 (1965).[7]

None of the foregoing cases raised the issue in the instant case, namely whether the government can try a defendant by file alone, without witnesses and without any cross-examination.

The file was admitted under the federal business and official records exceptions to the hearsay rule, embodied in 28 U.S.C. §§1732-1733. The main reason for these exceptions are the practical necessity or convenience of using generally trustworthy documents, the likelihood that the record maker will not remember the event he recorded, and the inconvenience of producing as witnesses, sometimes from areas distant from the trial court, government employees who have created numerous records in the course of conducting

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[7]For well-reasoned analyses of the subject, see *Comment, Confrontation and the Hearsay Rule,* 75 Yale L.J. 1434 (1966) and *Note, Preserving the Right to Confrontation—A New Approach to Hearsay Evidence in Criminal Trials,* 113 U. Pa. L. Rev. 741 (1965).

their daily government business. See *Wong Wing Foo v. McGrath,* 196 F.2d 120, 123 (9th Cir. 1952); *United States v. Van Hook,* 284 F.2d 489, 493 (7th Cir. 1960) *rev'd per curiam for resentencing,* 365 U.S. 609 (1961).

It is clear that the government and the courts would be inconvenienced if the right of confrontation required the government to produce the original declarant every time it wanted to have facts that are recorded in a document qualifying for the hearsay exception admitted in evidence, no matter how incidental or undisputed the facts, how trustworthy and probative the documents, or how difficult the task of producing witnesses or alternative evidence.

On the other hand, it is equally clear that the exceptions cannot be used indiscriminately. They cannot be used in criminal trials to prove essential and disputed points when witnesses are available. They cannot be used to send people to prison solely on the basis of government files. This case affords an opportunity to say so, and thereby begin to clarify this troubled area of the law and resolve the growing conflict and confusion in the lower courts.

The urgency of the situation is established not only by the instant case, but by the increasing importance of confrontation as a test of due process in cases turning on documentary evidence. Records created, processed, computerized and stored in business and official activity multiply. See, *e.g., Westin, Privacy and Freedom, passim* (1967). Crime involving proof of records proliferates and the forensic techniques for

using and interpreting them become steadily more sophisticated. The conflict between the admission of hearsay evidence under the business and official records exceptions to the hearsay rule and a defendant's right of confrontation, of first impression in this Court, signifies a growing problem area in the lower courts, federal and state. Three examples from each illustrate the point.

Federal court cases

(1) In *United States v. Johns-Manville Corporation,* 225 F. Supp. 61 (E.D. Pa. 1963), defendants in a criminal antitrust case moved for a pretrial ruling that §1732 was inapplicable in a criminal proceeding. The trial court refused to render such a blanket ruling, but stated that it agreed with the contention of the defendants that not all documents covered by §1732 are admissible in a criminal trial. "[T]he trial judge has the duty to determine whether such documents are constitutionally admissible under the Sixth Amendment guarantee of confrontation" and "the Government *should produce the maker of any important record wherever possible,* having in mind the language of the federal courts on this subject and the language of the Sixth Amendment." (*Id.* at 63) (Emphasis supplied.)

(2) In *McDaniel v. United States,* 343 F.2d 785, 789 (5th Cir.), *cert. denied,* 382 U.S. 826 (1965), in an appeal resulting from a conviction for violation of the federal securities laws, the Fifth Circuit, although rejecting the defendant's particular claim, acknowl-

edged that not all documents covered by §1732 are admissible in criminal trials.

(3) Defendants in prosecutions brought under the Selective Service laws have challenged the admissibility of their files in several instances. The leading case is *United States v. Van Hook,* 284 F.2d 489 (7th Cir. 1960), in which the defendant appealed in part on the grounds that the written record of proceedings at the induction center was hearsay and had been improperly admitted. The Seventh Circuit rejected his contention.[8]

State court cases

(1) In *State v. Tims,* 9 Ohio St. 136, 224 N.E.2d 348 (1967), the Ohio Supreme Court reversed a conviction of rape because of the admission into evidence, under Ohio's business record exception, of a hospital record to show the results of a physical examination made of the victim. The prosecution had failed to produce as a witness the physician who had examined the victim and drawn up the record.

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[8]It bears emphasis, however, that in the *Van Hook* case, unlike the instant case, the prosecution also produced a Special Agent of the Federal Bureau of Investigation, who had interviewed the defendant at the induction center, to testify and establish the elements of the crime. The written record was only secondary evidence, the government having produced a witness who could be cross-examined. See also *La Porte v. United States,* 300 F.2d 878 (9th Cir. 1962) (similar). In several other Selective Service cases involving hearsay objections, it is not apparent from the opinion whether or not the file was secondary to a government witness, *e.g., Kemp v. United States,* 415 F.2d 1185 (5th Cir. 1969), *cert. denied,* 397 U.S. 969 (1970); *United States v. Holmes,* 387 F.2d 781 (7th Cir. 1967), *cert. denied,* 391 U.S. 936 (1968); *Yaich v. United States,* 283 F.2d 613 (9th Cir. 1960). In none of these cases was the issue before the Court, trial by file alone, raised.

The Court stated that:

> "What may be an acceptable liberalizing of the rules of evidence in civil cases is not necessarily acceptable in a criminal prosecution. The difficulty of obtaining witnesses is not sufficient grounds for liberalizing an exception to the hearsay rule if the effect of such liberalization is to deny an accused a fair trial. Expediency is the reason for the Business Records as Evidence Act, but expediency is not a sound ground upon which a denial of a constitutional right may be based . . . This right of confrontation includes the right of cross-examination of the person who is the actual witness against him. If applicable in a criminal case, the Business Records as Evidence Act denies him such right." (*Id.* at 350-1).

(2) In *Bennett v. State,* 448 P.2d 253, 264 (Okla. Cr. 1968), the Court of Criminal Appeals of Oklahoma held that the trial court had properly excluded hospital records relating to the psychiatric condition of the defendant, at issue in a murder case, where the *defendant* had attempted to introduce them without supplying the doctor as a witness. The Court held that admission of the records under the Oklahoma official and business records exception to the hearsay rule would have violated the *State's* right to cross-examination, reasoning that if a defendant has the right to cross-examine witnesses against him, so does the prosecution.

(3) In *State v. Adrian,* 51 Hawaii 125, 453 P.2d 221 (1969), the Supreme Court of Hawaii held that the defendant, charged with embezzling from the hotel where she worked, was denied her constitutional right

of confrontation when the trial court admitted letters from hotel guests and their hotel receipts into evidence against her when the guests themselves did not testify. The court termed the production of the letters rather than the witnesses, who lived on the mainland, an "egregious denial of due process." (453 P.2d at 226.)

The instant case is strikingly similar to the three state cases described above. In two, the prosecution, and in one, the defense, tried to prove a critical point by producing documents rather than witnesses. In each, the court held the documents inadmissible.[9]

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[9]Further illustrating the confusion in the lower courts are numerous other cases within the past several years in which the admissibility of documentary evidence was challenged on confrontation grounds. Excluding cases involving the admissibility of confessions or preliminary hearing testimony, which this Court has ruled on recently, the objections were sustained in at least two cases. *United States v. Burruss*, 418 F.2d 677 (4th Cir. 1969) (police theft reports); *Robison v. State*, 430 P.2d 814, 817-18 (Okla. Cr. 1967) (medical records).

On the other hand, the confrontation objection has been overruled in a number of cases, some of which confuse confrontation and hearsay questions and consider satisfaction of a documentary exception to the hearsay rule sufficient to overcome either challenge. See, *e.g.*, *Hanley v. United States*, 416 F.2d 1160, 1167-68 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (bank collection slips); *Tomlin v. Beto*, 377 F.2d 276 (5th Cir. 1967) (record of prior convictions); *People v. Gambos*, 5 Cal.App.3d 187, 193-94 (1970) (evidence of purchase of car); *People v. Bryan*, 3 Cal. App.3d 327, 345 (1970) (record of prior convictions); *People v. Fiddler*, 102 Ill.App.2d 319, 243 N.E.2d 515 (1968) (certified copy of death certificate); *People v. Ziebell*, 82 Ill.App.2d 350, 227 N.E. 2d 127 (1967) (weight certificate); *State v. O'Brien*, 255 La. 704, 232 So.2d 484 (1970) (hospital records); *People v. Hislope*, 13 Mich.App. 63, 163 N.W.2d 675 (1968) (certified copy of driving record); *People v. Braswell*, 12 Mich.App. 685, 163 N.W.2d 461 (1968) (certified statement from state police commissioner that no record existed showing defendant licensed to carry a concealed weapon); *State v. Colvin*, 19 Ohio St. 2d 86, 249 N.E.2d 784 (1969) (certificate issued by secretary of state dental board to effect that no record existed showing defendant licensed to practice dentistry); *Richardson v. State*, 432 S.W.2d 100 (Tex. Cr. App. 1968) (record of prior convictions).

If this Court were to articulate guidelines for confrontation in this case, it would facilitate rather than complicate both trial court action and appellate review in subsequent cases. It is reasonable to anticipate that trial records will improve if prosecutors have a clear responsibility not to make indiscriminate use of exceptions to the hearsay rule and not to try their cases solely on the basis of government files.

Such guidelines are no less vital to the preservation of constitutional rights than are comparable standards already laid down, *e.g.,* that the prosecutor must have some evidence of guilt, *Thompson v. Louisville,* 362 U.S. 199 (1960); that no reasonable doubt must exist that error is harmless, *Chapman v. California,* 386 U.S. 18 (1967); that a search must be reasonable to be valid, *Mapp v. Ohio,* 367 U.S. 643 (1961); that a "contract" must exist before it can be impaired, *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938); or that "property" must exist before a state can exercise Congressional permission to tax it. *R.F.C. v. Beaver County,* 328 U.S. 204 (1946). Each of the foregoing standards requires constant adaptation to each factual context. In the main, however, such adaptation is the responsibility of the lower courts.

Over twenty-five years have elapsed since this Court undertook a careful analysis of the business records exception to the hearsay rule, and that analysis concerned its application in a civil case. *Palmer v. Hoffman,* 318 U.S. 109, 111-116 (1943). The Court upheld the exclusion of a record and refused to open "wide the door to avoidance of cross-examination." *Id.* at

114. Since then, documentary evidence has become increasingly important, even in criminal prosecutions. This Court must set a standard for the reasonable use of such records in criminal cases. Otherwise, records will be heedlessly used without regard to the right of confrontation and due process of law; in increasing numbers, defendants will be indiscriminately tried by file alone.

II. THIS CASE AFFORDS AN OPPORTUNITY TO RULE THAT THE GOVERNMENT MAY NOT OFFER RECORDS AS ITS SOLE PROOF OF AN ESSENTIAL AND DISPUTED ELEMENT OF A CRIME WHEN WITNESSES WHO OBSERVED THE RECORDED EVENTS ARE ABLE TO TESTIFY AND BE CROSS-EXAMINED.

The "paradigm evil the Confrontation Clause was aimed at" was "trial by affidavit." *Dutton v. Evans,* 39 U.S.L.W. 4015, 4021 (1970) (Harlan, J., concurring); *California v. Green,* 399 U.S. 149, ... (1970). In the instant case the prosecution did not even try by affidavit, for the documents in Lloyd's Selective Service file were not even sworn. The unsworn, uncross-examined document was critical, and it constituted the prosecution's entire case.

A defendant cannot be convicted of a crime when there is no evidence of guilt at all. *Thompson v. Louisville,* 362 U.S. 199 (1960). It ought to be equally obvious that a defendant cannot be convicted of a crime solely on the basis of hearsay from a declarant who is neither confronted, cross-examined, nor even sworn. In such a case, "A reliable evidentiary basis is totally lacking." *California v. Green,* 399 U.S. 149, ... n. 15 (1970).

The government cannot move against a person administratively without giving him the right to cross-examine the witnesses on an essential question of intent, *Reilly v. Pinkus,* 338 U.S. 269 (1949) (mail fraud order), and it ought not to be able to move against him criminally without allowing him to confront and cross-examine the witnesses against him on the same type of issue.

The Court has recently stated that "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Smith v. Illinois,* 390 U.S. 129, 131 (1968), quoting *Brookhart v. Janis,* 384 U.S. 1, 3 (1966).

Even if a showing of prejudice were necessary, it is easily made: Lloyd was convicted of a knowing and wilful violation of the law upon the cold language of a printed form. (Government's Exhibit 1.) The recitals of the forms were printed long before the event. The attesting officer merely had to insert Lloyd's name and fill in a few blanks. The form itself has no perceptions. It cannot reveal whether Lloyd or any other potential inductee knew what he was doing, or whether instead he was confused, incompetent, or even insane.

On the other hand, the inducting officer, and more particularly, the Special Agent of the FBI who interviews men who refuse to step forward at the induction center, can present testimonial evidence concerning their perceptions of a defendant's state of mind and the event. In the instant case, counsel for Lloyd would

have had the opportunity to demonstrate, upon cross-examination, that Lloyd was ignorant, that he did not understand what he was doing, and that he was, in a confused way, merely trying to assert his right to his statutory exemption as a conscientious objector.[10]

Testimony favorable to Lloyd elicited through effective cross-examination of government witnesses would have been far more telling than Lloyd's own testimony was. See *People v. Carmichael,* 198 Cal. 534, 547-548, 246 P. 62, 67-8 (1926) (prejudicial error since the defendant's testimony was not nearly so effective or probative on a key point of his defense as that potentially available from an impartial third-party witness whom he was not allowed to question).

Finally, as a practical matter, the government's method of proof forced Lloyd to relinquish his Fifth Amendment privilege against self-incrimination in order to get in any testimony probative of the issue of criminal intent. See *Dutton v. Evans,* 39 U.S.L.W. at 4023 n.2 (Marshall, J., dissenting).[11]

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[10]See Appendix A.

[11]It bears reminding that ours is an accusatory system. Lloyd was not required to testify as he did, and requiring defendants in similar cases to testify would reverse the usual presumption of innocence and place the burden of proof on them.

Similarly, Lloyd was not required to subpoena the inducting officer or the Special Agent of the FBI. Ordinarily, in our system, the prosecution must "shoulder the entire load." *Tehan v. Shott,* 382 U.S. 406, 415 (1966). "[T]he duty to confront a criminal defendant with the witnesses against him falls upon the *state. . . .*" *Dutton v. Evans,* 39 U.S.L.W. at 4023 n.4 (Marshall, J., dissenting). It is not incumbent upon defense counsel to go to the cost and trouble of bringing in the government's witnesses, accepting their testimony as his own, and taking the risk of its being adverse to his client or impeachable by the prosecution. See *Lopez v. United States,* 373 U.S. 427, 445 (1963) (Warren, C.J., concurring).

The notion that boilerplate forms suffice to establish specific criminal intent shocks the conscience. Unless it is promptly dispelled, its indulgence by the courts below will erode the right of confrontation and will encourage the kind of prosecutorial laxity, aggravated by temerity, illustrated by this case.

The rule that we suggest would meet the requirements of confrontation and due process, without impairing any legitimate government interest. It is a narrow and workable one: The government may not offer records as its sole proof of an essential and disputed element of a crime when witnesses who observed the recorded events are able to testify and be cross-examined.

III. THIS CASE AFFORDS AN OPPORTUNITY TO ARTICULATE MINIMUM STANDARDS OF PROOF AND EVIDENCE IN A FEDERAL CRIMINAL CASE, NAMELY THAT THE FEDERAL STATUTORY EXCEPTIONS TO THE HEARSAY RULE WERE NOT INTENDED TO AND DO NOT PERMIT THE GOVERNMENT TO CONVICT AND IMPRISON A FEDERAL DEFENDANT WITHOUT PRESENTING ANY OTHER EVIDENCE OF HIS CRIME BUT A GOVERNMENT FILE.

Articulation of the rule suggested above would reconcile 28 U.S.C. §1732-1733 with two vital principles of federal criminal law and procedure:

1. That the federal courts have the responsibility to supervise the administration of criminal justice in the federal courts, and a duty to establish and maintain fair evidentiary and procedural standards not limited to the minimum guarantees of due process. *McNabb v. United States,* 318 U.S. 332, 340-41 (1943);

Rea v. United States, 350 U.S. 214 (1956); *Thomas v. United States,* 368 F.2d 941, 947 (5th Cir. 1966) (collecting authorities).

2. That in criminal cases there is a clear preference for first-hand oral testimony. This preference is illustrated not only by the Sixth Amendment and the hearsay rule, but by the language of Federal Rule of Criminal Procedure 26.[12]

The purpose of the official and business records provisions, 28 U.S.C. §§1732-1733,[13] was to facilitate proof of record evidence and eliminate unnecessary impediments to efficient litigation, not to obviate the duty of prosecutors to come forward with first-hand oral testimony, subject to cross-examination, to prove critical elements in criminal cases.

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[12]"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

[13]The sections, in pertinent part, read:

§1732 (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

§1733 (a) Books or records of account or minutes of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

Furthermore, none of the major reasons for having the federal business and official records exceptions to the hearsay rule, as stated by the federal courts,[14] are presented in this case. First, the records in Lloyd's Selective Service file were not trustworthy or of significant probative value, because they were ambiguous concerning the disputed element of the charge—Lloyd's criminal intent. Second, only a short time had elapsed between the event and the trial so that the memories of the witnesses from the induction center, especially the Special Agent of the FBI who interviewed Lloyd, would not be stale and, in any event, could be easily refreshed from memoranda they made. Finally, calling such witnesses would have produced only minor inconvenience and would have been protective of a fair trial. The induction center was within the District,[15] there was no indication that the witnesses were unavailable, and the government customarily calls their counterparts in many other prosecutions under the Selective Service laws.

In *Greene v. McElroy,* 360 U.S. 474, 508 (1959), this Court stated its concern that "traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." See also *Peters v. Hobby,* 349 U.S. 331 (1955).

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[14]See list and citations on page 7 of this Brief.

[15]Government's Exhibit 1.

Congress has not through the hearsay exceptions expressed any purpose to allow trial by file. Those exceptions have the narrower purpose of facilitating proof of collateral issues. They should not by implication be expanded to allow people to be imprisoned on the basis of a printed form.

In short, 28 U.S.C. §§1732-1733 do not, and never were intended to, override fair evidentiary and procedural standards and the preference the law has for first-hand oral testimony, subject to cross-examination, in criminal cases. This Court should openly recognize that fact.

CONCLUSION

Petitioner's trial by file violated his right of confrontation and denied him due process. It was inimical to principles of fair evidence and procedure. This case affords the Court an opportunity to articulate rules which will preclude such indiscriminate use of the hearsay exceptions. Denial of the writ, now that trial by file alone has been sustained by the Court of Appeals, will give prosecutors a license to proceed without producing witnesses, so long as they can find an applicable exception to the hearsay rule.

The petition for a writ of certiorari should be granted and the judgment of the Court of Appeals reversed. A rational determination of the issues in

this case is essential to ensure the responsible administration of criminal justice.

Dated, January 7, 1971.

Respectfully submitted,

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(Appendix A Follows)

Appendix A

It is settled that specific intent is an element of the crime. As the Court of Appeals for the Eighth Circuit stated in *Smith v. United States,* 391 F.2d 543, 545 (8th Cir.), *cert. denied,* 393 U.S. 874 (1968):

> "The parties are in agreement that the criminal intent is an essential element of the offense proscribed by Section 462(a). This principle was firmly settled in United States v. Hoffman, 137 F.2d 416, 419 (2d Cir. 1943) and has been consistently recognized and applied. See, e.g., Silverman v. United States, 220 F.2d 36, 39-40 (8th Cir. 1955); Graves v. United States, 252 F.2d 878, 881-882 (9th Cir. 1958); Whitney v. United States, 328 F.2d 888, 889 (5th Cir. 1964)."

It is also settled that the prosecution has the burden of proof on each element of the offense. *United States v. Lybrand,* 279 F.Supp. 74, 81-3 (E.D.N.Y. 1967).

As the Court of Appeals for the Third Circuit stated in *United States v. Rabb,* 394 F.2d 230, 233 (3d Cir. 1968) (reversal for error in instructions to jury on criminal intent):

> "The Government must establish knowledge of the legal obligation and voluntary action or omission with the purpose of failing to perform such obligation."

The *Rabb* court also pointed out that the term "wilful" cannot cover carelessness or negligence, however inexcusable. (*Id.* at 232-3)

The case most similar to the instant one is *United States v. Sobczak,* 264 F.Supp. 752 (N.D. Ga. 1966). The district court judge, in a bench trial, acquitted the defendant, in part because the evidence, in his view, did not establish a wilful violation.

The defendant, being tried for the same offense as Lloyd, was also a Jehovah's Witness. His local board failed to send him a Form 150 (which Lloyd's board did send him) after he had signed the statement of conscientious objection upon registration (which Lloyd also signed). After it had classified him I-A, he called and told the clerk that he was a Jehovah's Witness. The judge labelled this phone call a second claim for exemption on his part. At the induction center, he (like Lloyd) also informed the authorities of his reasons for refusing to step forward (his third claim, the judge held). Only upon indictment (like Lloyd) did he see an attorney and complete the Form 150. Under these circumstances, the judge found that he did not have the requisite criminal intent.

See also *United States v. Kurila,* 401 F.2d 448 (3d. Cir. 1968) (judgment vacated and case remanded for more evidence on several points, one of which was intent); *Kidd v. United States,* 386 F.2d 422, 423 (10th Cir. 1967)) (judge below had correctly instructed jury that the defendant's claim that he believed he was entitled to a minister's classification went to the issue of intent and should be considered in determining whether his failure was "knowing and wilful").